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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-313

RICHARD L. MASON, individually, and A. MARCO TURK, Trustee of the Testamentary Trust Under the Will of Harry Turk, deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; GTE SATELLITE CORPORATION, a subsidiary of GENERAL TELEPHONE AND ELECTRONICS CORPORATION; and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Richard L. Mason and A. Marco Turk, Trustee under the will of Harry Turk, deceased, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, in the case at bench and, upon such review, the Court of Appeals' decision be reversed by an opinion which makes it clear that

Federal District Courts have jurisdiction to review and correct violations of the National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.) which occur within their districts.

Opinion Below

The non-published opinion of the United States Court of Appeals for the Ninth Circuit presented for review by this petition is Richard Mason, et al. v. United States of America, et al., 9th Cir. No. 76-1558. A copy of the opinion is attached hereto as Appendix "A".

Jurisdiction

The judgment of the United States Court of Appeals sought to be reviewed was filed and entered on May 27, 1977.

This Court's jurisdiction is pursuant to 28 U.S.C. § 1254.

Questions Presented For Review

1. When a communications satellite system, including three 120 foot high, dish-shaped, solid surface antennae, each 103

feet in diameter is proposed to be built in the Triunfo Pass area of the Santa Monica Mountains, California, a rustic area of natural beauty and tranquility:

(a) Can the Federal Communications Commission (FCC) license the satellite system without first preparing an Environmental Impact Statement, as required by the National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.) which is intended to insure consideration of all adverse environmental effects before the project is begun?

(b) Is a suit challenging the failure of the FCC to prepare an Environmental Impact Statement before it licensed the building of the antennae within jurisdiction of the District Court, in whose district the environmental impact will be felt?

2. Assuming arguendo that the purpose of the FCC jurisdictional review statute (47 U.S.C. § 402) is to limit substantive review of an FCC order or decision granting or denying a license to the District of Columbia Court of Appeals does that

jurisdictional limitation apply to an action seeking procedural compliance with NEPA by the FCC?

3. Even if this were a review of an FCC order or decision, does § 402 apply where:

- This is a review of an FCC determination made under Chapter 6 of Title 47 dealing with communication satellites systems; and

- section 402 by its own terms applies only to Chapter 5 determinations dealing with wire and radio communication systems?

Statutory Provisions

The following statutory provisions affect this petition. Each is reproduced in full in Appendix "B" attached hereto:

Administrative Procedure Act
5 U.S.C. § 701
§ 702
§ 703
§ 704
§ 706

Judiciary and Judicial Procedure
28 U.S.C. § 1331

Clean Air Act
42 U.S.C. § 1857h-5

National Environmental Policy Act
42 U.S.C. § 4321
42 U.S.C. § 4331(b)
42 U.S.C. § 4332(C)

Wire or Radio Communication
47 U.S.C. § 151
47 U.S.C. § 402(a)(b)

Communications Satellite System
47 U.S.C. § 701
47 U.S.C. § 702
47 U.S.C. § 721(c)(7)
47 U.S.C. § 741

Statement Of The Case

This is an action brought by Richard L. Mason and A. Marco Turk who are owners of 280 acres of natural, unspoiled land in Triunfo Pass, a sparsely populated area located in the Santa Monica Mountains in Los Angeles County, California. The Santa Monica Mountains are a natural scenic resource for the 8 million people of the Los Angeles Metropolitan area.

Mr. Mason and Mr. Turk enjoy the aesthetically pleasing beauty and recreational uses of their property, which is in the midst of a rural and recreational setting of natural and visual beauty and unique tranquility.

Mr. Mason and Mr. Turk (hereafter sometimes referred to as the Owners) want to protect their property against the adverse environmental impact of three 120 foot high, dish-shaped, solid surface antennae, each 103 feet in diameter. This is the equivalent of three twelve story buildings and appurtenent structures.

On September 12, 1973, the FCC authorized the erection of the antennae towers

on property contiguous to the Owners' property.

The antennae are part of a satellite communications system proposed by respondents General Telephone & Electronics Corporation, GTE Satellite Corporation and American Telephone & Telegraph Company (hereafter collectively called GTE). The entire satellite communications system which the Triunfo Pass antennae are a part, consist of 3 satellites serviced by 7 ground stations located across the United States.

The FCC issuance of construction permits and licenses for the Triunfo Pass antennae constituted a major federal action with substantial potential environmental impact.

NEPA, therefore requires, as a condition precedent to the FCC granting GTE's application, the preparation of an Environmental Impact Statement (EIS) which fully presents and evaluates any necessity for the proposed project, the impact of alternative actions, and the environmental consequences of the proposed project.

The FCC, however, failed to prepare an EIS before approving GTE's project and construction of the antennae.[1/] The FCC, by granting approval for construction without an EIS, violated NEPA. Congress declared [42 U.S.C. § 4331(b)]:

> "[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice: . . . ."

The Owners sought the protection of the District Court (Central District of California), in whose district the

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1/ GTE has begun to build 3 antennae even though the permit issued by the FCC approved the building of only 2 antennae.

proposed antennae are to be erected, by requesting that an order be issued requiring the FCC to carry out its obligations under NEPA before construction began.

The District Court has the power to judge the FCC's failure to implement NEPA, because the land suffering adverse environmental impact is within the Court's district.

Mason and Turk therefore moved the District Court for a summary judgment declaring the FCC permit invalid for failure to comply with NEPA, and for an injunction halting the construction of the proposed project for failure to comply with NEPA.

The District Court, however, dismissed Mason's and Turk's action as beyond its jurisdiction,[2/] believing that jurisdiction

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2/ The District Court's jurisdiction to review the FCC's violation of NEPA was based on the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., the federal question statute 28 U.S.C. § 1331 and NEPA 42 U.S.C. §§ 4321 et seq.

A copy of the District Court's judgment is attached hereto as Appendix "C".

resided solely in the Court of Appeals for the District of Columbia.

The Owners appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit. The Owners sought an order of the Court of Appeals informing the District Court that it had the power and jurisdiction to review the FCC's violation of NEPA.

The Court of Appeals, however, affirmed the District Court's dismissal of Mason's and Turk's action for lack of subject matter jurisdiction.

In a capsule, the Court of Appeals held:[3/]

- 47 U.S.C. § 402 which limits attacks on the merits of FCC orders or decisions to the Courts of Appeals precluded review of the FCC's violation of NEPA in the District Court in whose district the violation occurred;

- 47 U.S.C. § 402 (which applies only to FCC orders as to wire

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3/ The jurisdiction of the Court of Appeals to review the District Court judgment is 28 U.S.C. § 1291.

or radio communications) confers exclusive jurisdiction over a communication satellite system notwithstanding that communication satellite systems are provided for in a different chapter of 47 U.S.C. §§ 701 et seq.; and

- that therefore a violation of NEPA occurring in California by the FCC can only be reviewed by the Court of Appeals in Washington, D.C.

This holding is contrary to the power, and especial expertise, of local Federal District Courts to review and correct violations of NEPA where the violation occurs.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In this case, Mr. Mason and Mr. Turk seek compliance by the FCC with the National Environmental Policy Act.

The decision of the Court of Appeals is based on the assumption that the Owners are attempting to review the merits of the FCC's approval of GTE's application. This assumption is wrong.

An attack for noncompliance with NEPA (contrary to the Court of Appeals' decision) does not go to the merits of the FCC's action, but rather to the FCC's ability to act at all. All Federal Courts are competent to review the FCC's ability to legally act.

The FCC does not deny that it violated the National Environmental Policy Act, when it approved the building of three, 120 foot high, dish-shaped, solid surface antennae, each 103 feet in diameter in the Triunfo Pass area of the Santa Monica Mountains, without first preparing an Environmental Impact Statement.

Preparation of an EIS was a condition precedent to FCC approval. The FCC does not dispute the fact that its failure to prepare an EIS invalidated its approval.

When the FCC failed to prepare an EIS, it rendered itself incapable of evaluating adverse environmental impacts on the Santa Monica Mountains.

Nevertheless, the Court of Appeals agreed with the FCC that the District Court, which is located where the impact will be felt, is powerless to remedy the FCC's disregard of NEPA.

NEPA was passed by Congress because agencies, like the FCC, seem concerned with their missions, and not the consequences of their actions to the environment.

NEPA is a mandate for the Federal agencies, but the FCC thumbed its nose at the statute. The Court of Appeals' decision rewarded the FCC's disregard.

Conforming with NEPA is not only the duty of the FCC. It is the business and concern of the public in general, and in particular persons such as Mason and

Turk, who are directly affected by the FCC's actions.

Relief for a violation of NEPA should be available at the site where the violation affects people and property.

Federal district courts regularly have taken jurisdiction over violations of NEPA within their districts. To the extent that the FCC has violated its clear, nondiscretionary legal duty to comply with NEPA, by not having an EIS, availability of injunctive relief in the District Court is needed to provide a convenient forum to the injured persons.

NEPA REQUIRED THE FCC TO PREPARE AN EIS BEFORE IT APPROVED THE SATELLITE COMMUNICATIONS SYSTEM

The FCC's approval of the Triunfo Pass antennae and of the 6 other earth stations in the United States, was invalid because the FCC failed to first prepare and evaluate an EIS.

NEPA requires that an EIS be prepared for every major Federal action which significantly affects the human environment.

The FCC approval of the Triunfo Pass antennae is such an action.

The EIS requirement is stated in § 102 of NEPA at 42 U.S.C. § 4332 at paragraph (C). That statute requires that every Federal agency:

> "(C) Include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on
>
> "(i) any environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . ." (Emphasis added.)

In Davis v. Morton (10th Cir. 1972) 469 F.2d 593, 597 the Court defined major Federal action:

> "Appellees [Secretary of the Interior et al.] concede that where a federal license or permit is involved, or where Congress possesses and has utilized its plenary power of regulation under the interstate commerce clause or other constitutional authority, federal approval constitutes major federal action."

NEPA therefore, required the FCC to prepare an EIS before it gave its approval for construction of this satellite system.

FAILURE TO PREPARE AN EIS INVALIDATES THE FCC APPROVAL

The U.S. Courts have determined that failure to prepare an EIS invalidates a major federal action which significantly affects the human environment.

In Calvert Cliffs' Coord. Com. v. United States A.E. Com'n. (D.C. Cir. 1971) 449 F.2d 1109, 1115, the District of Columbia Circuit Court held the federal agency action must be overturned where there had been a failure to comply with NEPA.

> "We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors -- conducted fully and in good faith -- it is the

> responsibility of the courts to reverse. As one District Court has said of Section 102 requirements: 'It is hard to imagine a clearer or stronger mandate to the courts.'" (Emphasis added.)

The FCC granted GTE permission to construct antennae at Triunfo Pass without the benefit of an EIS. Thereby, the FCC disabled itself from "individualized consideration of environmental factors". Calvert Cliffs Coord. Com. v. United States A.E. Comm'n. (D.C. Cir. 1971) 449 F.2d 1109, 1115.

By its disregard of NEPA, the FCC was unable to "balance environmental factors" against the need for the antennae.

This self-crippling invalidates the FCC's approval.

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THE DISTRICT COURTS HAVE THE POWER AND THE DUTY TO REVIEW AND REMEDY VIOLATIONS OF NEPA BY THE FCC

It is unfortunate that Federal regulatory agencies like the FCC sometimes disregard NEPA in their efforts to "get

their job done". For this reason, the Federal district courts have exercised their equitable powers to ensure that the benefits of NEPA are not lost by the people of this country.

Since 1969, when NEPA became law, hundreds of cases have shown the necessity of district court intervention to protect the environment against zealous agency action through NEPA enforcement.[4/]

In the case at bench, the FCC does not dispute that it disregarded NEPA by failure to prepare an EIS before it approved the construction of the 3 antennae in the Triunfo Pass area of the Santa Monica Mountains. Instead, the FCC defends by saying only the Court of Appeals for the District of Columbia has jurisdiction to protect against FCC law

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4/ The District Courts can review Federal Agencies' noncompliance with NEPA under the "Federal Question" Statute 28 U.S.C. § 1331 (Town of Groton v. Laird [D. Conn. 1972] 353 F. Supp. 344, 348), and under the "Administrative Procedure Act", 5 U.S.C. §§ 701 et seq. (United States v. Joseph G. Moretti [5th Cir. 1973] 478 F.2d 418, 432; Citizens to Preserve Overton Park v. Volpe [1971] 401 U.S. 402, 410).

violation. The 9th Circuit Court of Appeals was persuaded that the District Court is impotent to remedy violation of a clear, nondiscretionary, procedural duty under NEPA.

If review of the merits of an FCC decision were the issue, there could be some rationality to sole jurisdiction vesting in the District of Columbia Circuit, even though § 402 does not command so for satellite systems.

But, instead, what is before this Court is a dereliction of duty by failure to prepare an EIS before blessing a massively environmentally degrading construction program.

Any district court can decide if an EIS was, or was not, prepared.

Sensible work load distribution is at stake at two levels:

- Why burden Courts of Appeals with matters which district courts are better equipped to deal with, because of the fact finding involved?

- Secondly, the District of Columbia Circuit Court is an especially burdened tribunal. Where its expertise improves dispute resolution, demand use of that expertise. However, where that expertise is not needed, letting any district court with the project in its geographic jurisdiction act, makes more sense. This Court may even have a selfish motivation in keeping the D.C. Circuit as free as possible to thoughtfully screen matters arising from Federal Agency actions which seem probable candidates for this Court's over demanded attention.

Moreover, the district courts can only enforce the law when violations are called to their attention. Private litigants perform an important function in so doing. The combination of the 30 day Statute of Limitation of § 402 to review FCC action on the merit, and the economic barrier in the cost and inconvenience of

litigating a continent away from the Owners' property, serve to encourage FCC lawlessness, by insulating the FCC from review. If the FCC is made aware that injured persons are able to effectively seek relief, the FCC will be encouraged to obey the law, rather than breach it as they have done here.

Other Courts have agreed with the desirability of encouraging private enforcement.

> "Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."
>
> * * *
>
> "Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts."
>
> * * *
>
> "[And] if the decision [of the agency] was reached procedurally without individualized consideration and balancing of environmental factors

> - conducted fully and in good faith - it is the responsibility of the courts to reverse. As one District Court has said of Section 102 requirements: 'It is hard to imagine a clearer or stronger mandate to the Courts'." (Emphasis added.) Calvert Cliffs Coord. Comm. v. United States A.E. Comm'n. (1971 D.C. Cir.) 449 F.2d 1109, 1111, 1114, 1115 and numerous cases following.

The principles governing enforcement of NEPA by the U.S. district courts are now familiar.[5/]

The Court of Appeals, however, in this case, allowed the District Court to evade its responsibility under NEPA.[6/]

5/ The Federal District Courts have been vigorous in reviewing agency compliance with NEPA and in requiring strict procedural compliance. (See Sierra Club v. Coleman [D.C.C. 1975] 405 F. Supp. 53, 56; City of Romulus v. County of Wayne [E.D. Mich. 1975] 392 F. Supp. 578, 584, 597; Sierra Club v. Morton [N.D. Cal. 1975] 400 F. Supp. 610, 648; Rankin v. Coleman [E.D. N.C. 1975] 394 F. Supp. 647, 654, modified 401 F. Supp. 664.)

6/ Agency non-compliance has required the courts to become the principal enforcers of NEPA. (E. Dolgin and T. Guilbert, Federal Environmental Law, 277 [1974].)

If the judgment of dismissal here is permitted to stand, major irreversible harm will be done to a unique scenic resource, while at the same time, future agency scoffing at NEPA will be encouraged.

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AN ACTION SEEKING COMPLIANCE WITH NEPA BY THE FCC IS NOT THE TYPE OF REVIEW OF A FINAL AGENCY ORDER OR DECISION CONTEMPLATED BY 47 U.S.C. § 402

The court below mistakenly rejected the Owners' position that this action did not challenge an order of the FCC on its merits. The Owners were instead trying to enforce the mandate of NEPA.

The Court of Appeals felt that if it allowed the district court to exercise jurisdiction over the FCC's violation of NEPA, it would subvert the intention of Congress: that there be a centralized and expedited review procedure of FCC construction permit decisions in the District of Columbia Court of Appeals to prevent the FCC from being subjected to

the risk of different standards on review among the circuits.

Mason and Turk believe, however, that the purpose of the FCC jurisdictional review statute (47 U.S.C. § 402), which limits review of an FCC order or decision granting or denying a license to the District of Columbia Court of Appeals, does not apply to a procedural compliance with NEPA by the FCC.

The drafters of 47 U.S.C. § 402 were concerned with insuring uniformity of judicial review of the merits of FCC orders and decisions. They did so by placing all such review on the merits in one court.

But, the compliance with NEPA is a condition precedent to FCC action. Thus, an attack for non-compliance with NEPA does not go to the merits of the FCC's action, but rather to the FCC's ability to act at all. All district courts are competent to review the FCC's compliance with NEPA.7/

7/ Congress could not have intended for 47 U.S.C. § 402 to preclude review of an FCC violation of NEPA. Section 402 was enacted in 1934, while NEPA was enacted in 1969.

The Court of Appeals wraps its arguments[8/] in the blanket of uniformity of decision, but does not say how ordering the FCC to comply with NEPA will interfere with "uniformity of decision". There is no interference with uniformity by telling the FCC it has failed to comply with NEPA.

In this case, where failure to comply with NEPA is the issue, expert consideration of the matter by the FCC (or the District of Columbia Circuit Court) is not required. The purpose of § 402 was to insure uniformity of review concerning the merits of granting or denying FCC licenses. In this case, however, the District Court is merely being asked to determine whether the FCC has complied with the procedural requirements of NEPA.

In Izaak Walton League of America v. Schlesinger (D.D.C. 1971) 337 F. Supp.

8/ The Court of Appeal disregarded the principle enunciated in Abbott Laboratories v. Gardner (1967) 387 U.S. 136, 18 L.Ed.2d 681: that courts should restrict access to judicial review only upon a showing of "clear and convincing evidence" of a contrary legislative intent.

287, 291, the distinction between an agency order or decision, and a violation of NEPA was set forth:[9/]

> "Plaintiffs are not requesting review of the granting or denying of a license. They request this [District] Court to direct the AEC to comply with a specific statutory mandate [NEPA]. In this regard the [District] Court does have jurisdiction to consider the issues presented, namely, whether there has been a violation of a clear, non-discretionary, legal duty." (Emphasis added.)

Accord: Gage v. Commonwealth Edison Company (N.D. Ill. 1972) 356 F. Supp. 80, 83;

Environmental Defense Fund v. Hardin (D.D.C. 1971) 325 F. Supp. 1401, 1407.

9/ A case analogous to the question of judicial review of agency action to that at bench is Nader v. Allegheny Airlines (1976) ___ U.S. ___, 48 L.Ed.2d 643, where this Court held that the CAB did not have to review the Airline practice of overbooking, before a District Court could determine if common law fraud exists. The Court found that this was not the type of technical question of fact uniquely within the CAB expertise.

See also Farmer v. Carpenters (1977) ___ U.S. ___, 51 L.Ed. 338, 351-4.

District Courts routinely exercise their jurisdiction to remedy NEPA violations no matter which government agency has violated NEPA.

In Save Our Sound Fisheries Ass'n. v. Callaway (D.R.I. 1974) 387 F. Supp. 292, 297, the plaintiff sought to enjoin proposed dumping of dredged spoil at an ocean dumping site by the Army Corps of Engineers. The plaintiff asserted that the governmental agencies had not complied with federal environmental law. The Court stated:

> "I find clear authority for this Court taking jurisdiction over such a claim of alleged failure of an agency to comply with procedural mandates of Federal law relating to environmental matters."

See also:

> Citizens For Clear Air, Inc. v. Corp. of Eng. U.S. Army (S.D.N.Y. 1972) 349 F. Supp. 696, 703;
>
> City of Romulus v. County of Wayne (E.D. Mich. 1975) 392 F. Supp. 578, 584.

Getty Oil Company (Eastern Operation) v. Ruckelshaus (3rd Cir. 1972) 467 F.2d 349, relied on by the Court of Appeals,

rather than justifying its opinion, instead shows the difference between the kind of case reviewable under § 402, and the case at bench.[10/] In Getty and cases under § 402, the merits of an agency's decision is at issue. This is shown by the Court's determination that,

> "Getty's argument against enforcement requires a determination by the Court whether the regulation [promulgated under the Clean Air Act] is unnecessary, unreasonable or capricious." (467 F.2d at 356.)

Furthermore, the Court of Appeals' reliance on United States v. SCRAP (1973) 412 U.S. 669, 37 L.Ed.2d 254, demonstrates a misunderstanding of Mason's and Turk's complaint.

10/ In Getty § 307 of the Clean Air Act (42 U.S.C. § 1857h-5) was the relevant statute. The purpose of the Clean Air Act is to control and prevent air pollution. The judicial review provisions of the Clean Air Act are similar to 47 U.S.C. § 402. Section 307 provides for review by the Court of Appeals for the District of Columbia of all air quality standards promulgated by the EPA which are challenged on their merits after review by the Administrator of the EPA.

The Owners are not saying that NEPA suspends § 402. To the contrary, the Owners believe that NEPA and § 402 work in harmony, as violation of NEPA by the FCC is not a decision within the scope of § 402.

In SCRAP, the student group challenged the I.C.C.'s decision to uphold a temporary rate change imposed by the railroads. The grounds of the attack were that NEPA applied to rate setting. The Supreme Court in SCRAP held that NEPA did not apply to I.C.C.'s rate setting. The question was not whether the I.C.C. had complied with NEPA.

Section 402[11/] has nothing to do with NEPA, or this case.

11/ It is indisputable that not all FCC actions fall within the review provisions of § 402 and review of the District of Columbia Circuit. (See, e.g., FCC v. Columbia B. System [1940] 311 U.S. 132, 85 L.Ed. 87.)

EVEN IF THIS WERE A REVIEW OF AN AGENCY ORDER OR DECISION, § 402 DOES NOT APPLY BECAUSE THIS IS A REVIEW OF AN FCC DETERMINATION MADE UNDER CHAPTER 6 OF TITLE 47

Mr. Mason and Mr. Turk believe that the District Court's jurisdiction under NEPA is clear. This action is not a review of an FCC order within the meaning of the 47 U.S.C. § 402 exclusive District of Columbia jurisdiction.

Nonetheless, assuming arguendo that the District Court were reviewing an order of the FCC, § 402 does not apply. Section 402 relates to review of FCC orders except those dealing with communication satellite systems. Section 402 applies to Chapter 5, by its plain words (47 U.S.C. §§ 151 et seq.) not to Chapter 6 which governs satellite systems (47 U.S.C. §§ 701 et seq.).

Section 402, which was the section accepted by the Courts as controlling below, is included in subchapter IV of Chapter 5, which is entitled Procedural

and Administrative Provisions. Subchapter IV deals with enforcement of Chapter 5. Section 402 is, by its terms, limited in its application to interests covered under Chapter 5.

Section 402 (part of Chapter 5) reads, in part:

> "(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Chapter 19A of Title 5.
>
> Right to Appeal
>
> "(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases: . . . ." (Emphasis added.)

This case concerns the construction of a satellite communications ground station at Triunfo Pass.

FCC jurisdiction as to satellite communication ground stations is established by Chapter 6.

Section 702 of Chapter 6 defines the species of installation with which we are are here concerned:

> "(2) the term satellite terminal station refers to a complex of communication equipment located on the earth's surface, operationally connected with one or more terrestrial communication systems, and capable of transmitting telecommunications to or receiving telecommunications from a communications satellite system."

The authority by which the FCC can approve the building of the satellite communication ground station is also in Chapter 6 in § 721 (c)(7).

Chapter 5 - which contains § 402 - is entitled "Wire or Radio Communication". Chapter 6 is entitled "Communication Satellite System".

The Court of Appeals did not answer the question of why, if Congress had intended communication satellite systems to have the same scope of review as wire and radio communication systems, it did not add the sections of Chapter 6 (47 U.S.C. §§ 701 et seq.) to Chapter 5 (47 U.S.C. §§ 151 et seq.), or change

§ 402 to refer to Chapter 6. Either way, Congress could have granted the D.C. Circuit exclusive jurisdiction if that was the Congressional intent.

But Congress intended satellite communication systems to be differently treated, and stated its intent with emphasis when it provided,

> "Whenever the application of the provisions of this chapter [6] shall be inconsistent with the application of the provisions of the Communications Act [chapter 5] the provisions of this chapter shall govern." (47 U.S.C. § 741).

The site of review of FCC actions as to satellite systems is not set forth in Chapter 6. It is thereby inconsistent with Chapter 5's exclusive jurisdiction. By § 741 it is under general jurisdictional rules, rather than Chapter 5's exclusive siting.

As the Court of Appeals notes, Chapter 6 acknowledges the existence of Chapter 5 by referring to Chapter 5. So what? More importantly, since Chapter 6 makes clear Congress's awareness of Chapter 5, the non-grant of exclusive jurisdiction

becomes emphasized.

The Court of Appeals relies on Network Project v. F.C.C. (D.C. Cir. 1975) 511 F.2d 786, for the proposition that § 402 (b) applies to review of Chapter 6 - earth satellite station - matters. However, in Network, the issue of propriety of review of Chapter 6 orders under § 402 was neither raised nor litigated. The case, thus, provides no assistance in answering the question of exclusive site of jurisdiction versus general rule of multi-site of jurisdiction.

The Court of Appeals points out that the FCC itself has determined that review of questions dealing with the domestic satellite system are governed by Chapter 5 and not Chapter 6. But the FCC's erroneous finding does not disable this Court from correcting the FCC's error. As this Court succinctly put it in Manhattan General Equipment Company v. Commissioner (1936) 297 U.S. 129, 134, 80 L.Ed. 528:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end

> is not the power to make law - for no such power can be delegated by Congress - but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

The FCC's interpretation, accepted by the Court of Appeals, would nullify the distinction expressly established by Congress between wire and radio communication systems (Chapter 5) and satellite communication systems (Chapter 6). It is thus beyond the FCC's power and, in the words of this Court in Manhattan, supra, ". . . a mere nullity."

Next the Court of Appeals states that Chapter 6 only applies to international systems of communication satellites. On the contrary, § 701(d) of Chapter 6 states:12/

> "It is not the intent of Congress by this Act to preclude the use of the communications satellite for domestic communication services

12/ With respect, the Court of Appeals noted this Section, but disregarded its meaning.

> where consistent with the provisions of this Act nor to preclude creation of additional communications satellite systems."

The Court of Appeals concluded (without supporting authority), that the FCC's authority over domestic satellite communication systems flow from the 1934 Act.

How?!?

Satellite communication systems did not exist - except in science fiction - in 1934. How the 1934 Act gave jurisdiction over domestic satellite facilities that did not exist when the Act was passed is not understood by the Owners. That kind of superhuman Congressional prescience is to be hoped for, but more often, an all too human Congress seems to have found it hard to deal even with visible problems much less those not yet envisioned.

The Court of Appeals fell into its error because it mistakenly believed that the general definition of a "radio", in Chapter 5, controlled over the different classification of satellite systems. To reach this error, the court had to ignore the specific definition contained in

Chapter 6 of a "satellite communications ground station" which is contained in § 702 subpart 2 of Chapter 6. The more recent, and the more specific statute controls over the general by the rules of statutory construction. (See The Louis Olsen [9th Cir. 1893] 57 Fed. 845.)

Congress has separated the wire from satellite installations. That deliberate Congressional separation deserves recognition by the Courts.

CONCLUSION

The FCC violated its procedural non-discretionary obligations under NEPA by failing to prepare and study an EIS before considering whether to issue GTE a permit to build its earth satellite station in Triunfo Pass.

Congress intended NEPA to be enforced.

District Courts throughout the country have, for years, exercised their powers to accomplish compliance with the Congressional NEPA mandate.

Mr. Mason and Mr. Turk went to their District Court to correct the FCC failure because of the environmental havoc up on the Santa Monica Mountains.

The courts below, however, accepted the self-disabling argument, that there is only one court competent to restrain FCC's lawless obstruction of justice.

That court requires a $375.00 airline ticket, 2 days of travel, and the expense of a Washington hotel room for each court appearance. If there be a sincere desire to lower the cost of litigation, so real people can have remedies when they are wronged, this FCC "boot strap" hurdle and trap of one court with jurisdiction, deserves rejection.

The nation needs thoughtful consideration of environmental costs in approval of federal actions. Availability of cost affordable remedies to the citizenry will discourage governmental law breakers.

No technical expertise is required to know if the FCC must prepare an EIS

before taking action.[13/] All district courts possess that ability. They routinely exercise it with respect to all other federal agencies.

Mr. Mason and Mr. Turk ask this Court to inform the courts below that their voluntary disablement and shift of work load to the District of Columbia was erroneous.

WHEREFORE, the Owners pray that a Writ of Certiorari issue, so the salutory purposes of NEPA may be more reliably achieved.

Respectfully submitted,

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13/ Acknowledging the rationale for centralization of decision making be where there is expertise, recent Senate investigations [4 Study on Federal Regulation, "Delay in Regulatory Process", Senate Committee on Government Affairs] raises a question as to whether FCC expertise is theoretical or real.

APPENDIX "A"

FILED MAY 27 1977

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF
APPEALS

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. MASON, and
A. MARCO TURK, Trustee
under the Will of HARRY TURK,
Deceased,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION;
GTE SATELLITE CORPORATION, ETC.;
GENERAL TELEPHONE AND ELECTRONICS
CORPORATION, and AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,

Defendants-Appellees.

NO. 76-1558

MEMORANDUM

Appeal from the United States District Court
Central District of California

Before: CARTER, GOODWIN, and SNEED,
Circuit Judges.

Plaintiffs appeal from the district court's dismissal of their action, for lack of subject matter jurisdiction. Their complaint challenged the Federal Communications Commission (FCC) approval

of a domestic communications satellite system facility on the ground that the agency failed to comply with the National Environmental Policy Act (NEPA).

The appeal presents the issue whether the district court had jurisdiction to hear a collateral challenge to NEPA compliance by the FCC despite the provisions of 47 U.S.C. § 402 limiting attacks on FCC final orders to the Courts of Appeals.

The district court held that the plaintiffs had standing but that 47 U.S.C. § 402(b) limits challenges to FCC construction permits to the Court of Appeals for the District of Columbia Circuit. The action was therefore dismissed for lack of subject matter jurisdiction.

47 U.S.C. § 402 expressly limits proceedings to "enjoin, set aside, annul, or suspend" an order under Chapter 5 of the Communications Act of 1934 to the Courts of Appeals. See also 28 U.S.C. § 2342. Some orders may be reviewed only in the D.C. Circuit. 47 U.S.C. §402(b). But whether or not this is such an order, § 402 clearly ousts district courts of jurisdiction over challenges to FCC

orders. Cf. United States v. SCRAP, 412 U.S. 669 (1973).

The plaintiffs argue that the ground site construction permit was issued under the Communications Satellite Act of 1962, 47 U.S.C. § 701 et seq., and that therefore the limitations of § 402 do not preclude district court subject matter jurisdiction over challenges to such orders. They argue that the 1934 Act could not cover domestic satellite systems because they were unheard of in 1934. It should be noted that the FCC believes its authority over domestic satellite systems flows from the 1934 Act. See 22 F.C.C.2d 86, 128-33.

Although the legislative history of the Act is silent on the point, the language of the 1934 Act covers the interstate or foreign "transmission of energy by radio." 47 U.S.C. § 152(a). This language is broad enough to encompass domestic satellite communications systems. Moreover, the 1962 Act created a global communications system. It was thus addressed to international, not domestic, satellite communications. 47 U.S.C. § 701. The only reference in the 1962

Act to domestic communications is the declaration of policy that Congress did not intend to preclude use of the global system for domestic communications services "where consistent with the provisions of [the 1962 Act]."

We conclude that the FCC's authority over domestic satellite communications systems flows from the 1934 Act and that § 402 requires review in the Courts of Appeals, not in the district courts. This view finds support in Network Project v. F.C.C., 511 F.2d 786 (D.C. Cir. 1975) where the D.C. Circuit reviewed, under § 402(b), orders of the FCC authorizing construction of domestic satellite communications facilities.

Nothing in NEPA altered this jurisdictional limitation. In fact, the Supreme Court has noted that "NEPA was not intended to repeal by implication any other statute." United States v. SCRAP, supra at 694. Thus, the exclusive jurisdiction in the Courts of Appeals to hear challenges to FCC orders remains. NEPA did not "sub silentio revive judicial power that had been explicitly eliminated by Congress." United States

v. SCRAP, supra at 696.

Nor did the Administrative Procedure Act, 5 U.S.C. § 706 (APA) extend jurisdiction of the district courts to cases not otherwise within their competence. Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 356 (3 Cir. 1972), cert. denied, 409 U.S. 1125 (1973). Plaintiffs were entitled to appeal to the Court of Appeals for the District of Columbia Circuit within thirty days of the issuance of the permit. 47 U.S.C. §§ 402(b)(5) and (6), 402(c). Their failure to utilize the exclusive review procedures prescribed by Congress should not now be excused by allowing a collateral attack on the order of the FCC in the district court simply because they attack the order under NEPA rather than under policies squarely within FCC expertise.

In a similar context, albeit pre-NEPA, this court said that "Congress intended that all attacks on cease and desist orders of the Commission, on whatever ground, must be by appeal to the District of Columbia Circuit under [47 U.S.C.] § 402(b)(7)." Valley Vision, Inc. v. F.C.C., 399 F.2d 511, 514 (9 Cir. 1968).

The same may be said of § 402(b)(6) providing for review, at the behest of "aggrieved" persons, of FCC construction permits. The statute provides a centralized and expedited review procedure and prevents the FCC from being subjected to different standards on review of its construction permit decisions.

The judgment is AFFIRMED.

APPENDIX B

5 U.S.C. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that --

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter --

(1) "agency" means each authority of the Government of the United States whether or not it is within or subject to review by another agency, but does not include --

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States:

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and

1744 of title 12; chapter 2 of title 41; or sections 1622, 1844, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2)"Person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of

the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A

preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and in addition, may impose costs on the plaintiff.

42 U.S.C. § 1857h-5. Administrative proceedings and judicial review

(a) (1) In connection with any determination under section 1857c-5(f) of this title or section 1857f-1(b)(5) of this title, or for purposes of obtaining information under section 1857f-1(b)(4) or 1857f-6c(c)(3) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper,

book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 1857f-1(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under

section 1857f-1(b)(1) of this title), any determination under section 1857 f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857 f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof)

to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

42 U.S.C. § 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4331 Congressional declaration of national environmental policy

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and

coordinate Federal plans, functions, programs, and resources to the end that the Nation may -

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. § 4332(C) Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall -

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and

the comments and views of the appropriate Federal,State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

47 U.S.C. § 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 402(a)(b). Judicial review of Commission's orders and decisions - Procedure

(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided

by and in the manner prescribed in chapter 19A of Title 5.

Right to appeal

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

47 U.S.C. § 701. Congressional declaration of policy and purpose

(a) The Congress declares that it is the policy of the United States to establish, in conjunction and in cooperation with other countries, as expeditiously as practicable a commercial communications satellite system, as part of an improved global communications network, which will be responsive to public needs and national objectives, which will serve the communication needs of the United States and other countries, and which will contribute to world peace and understanding.

(b) The new and expanded telecommunication services are to be made available as promptly as possible and are to be extended to provide global coverage at the earliest practicable date. In effectuating this program, care and attention

will be directed toward providing such services to economically less developed countries and areas as well as those more highly developed, toward efficient and economical use of the electromagnetic frequency spectrum, and toward the reflection of the benefits of this new technology in both quality of services and charges for such services.

(c) In order to facilitate this development and to provide for the widest possible participation by private enterprise, United States participation in the global system shall be in the form of a private corporation, subject to appropriate governmental regulation. It is the intent of Congress that all authorized users shall have nondiscriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this chapter be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public; and that the activities of the corporation created under this chapter and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws.

(d) It is not the intent of Congress by this chapter to preclude the use of the communications satellite system for domestic communication services where consistent with the provisions of this chapter nor to preclude the creation of additional communications satellite systems, if required to meet unique governmental needs or if otherwise required in

the national interest. Pub.L. 87-624, Title I, § 102, Aug. 31, 1962, 76 Stat. 419.

47 U.S.C. § 702. Definitions

As used in this chapter, and unless the context otherwise requires --

(1) the term "communications satellite system" refers to a system of communications satellites in space whose purpose is to relay telecommunication information between satellite terminal stations, together with such associated equipment and facilities for tracking, guidance, control, and command functions as are not part of the generalized launching, tracking, control, and command facilities for all space purposes;

(2) the term "satellite terminal station" refers to a complex of communication equipment located on the earth's surface, operationally connected with one or more terrestrial communication systems, and capable of transmitting telecommunications to or receiving telecommunications from a communications satellite system.

(3) the term "communications satellite" means an earth satellite which is intentionally used to relay telecommunications information;

(4) the term "associated equipment and facilities" refers to facilities other than satellite terminal stations

and communications satellites, to be constructed and operated for the primary purpose of a communications satellite system, whether for administration and management, for research and development, or for direct support of space operations;

(5) the term "research and development" refers to the conception, design, and first creation of experimental or prototype operational devices for the operation of a communications satellite system, including the assembly of separate components into a working whole, as distinguished from the term "production," which relates to the construction of such devices to fixed specifications compatible with repetitive duplication for operational applications; and

(6) the term "telecommunication" means any transmission, emission or reception of signs, signals, writings, images, and sounds or intelligence of any nature by wire, radio, optical, or other electromagnetic systems.

(7) the term "communications common carrier" has the same meaning as the term "common carrier" has when used in the Communications Act of 1934, as amended, and in addition includes, but only for purposes of sections 733 and 734 of this title, any individual, partnership, association, joint-stock company, trust, corporation, or other entity which owns or controls directly or indirectly, or is under direct or indirect common control with, any such carrier; and the term "authorized carrier", except as otherwise provided for purposes of section 734 of this title

by section 734(b)(1) of this title, means a communications common carrier which has been authorized by the Federal Communications Commission under the Communications Act of 1934, as amended, to provide services by means of communications satellites;

(8) the term "corporation" means the corporation authorized by subchapter III of this chapter.

(9) the term "Administration" means the National Aeronautics and Space Administration; and

(10)the term "Commission" means the Federal Communications Commission.

47 U.S.C. § 721(c)(7). Implementation of policy

In order to achieve the objectives and to carry out the purposes of this chapter --

(c) the Federal Communications Commission, in its administration of the Communications Act of 1934, as amended, and as supplemented by this chapter, shall--

(7) grant appropriate authorizations for the construction and operation of each satellite terminal station, either to the corporation or to one or more authorized carriers or to the corporation and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity. In determining the public interest, convenience, and necessity the Commission shall authorize

the construction and operation of such stations by communications common carriers or the corporation, without preference to either;

47 U.S.C. § 741. Common carrier status of corporation; laws applicable to corporation; common carrier activity; conflict of laws

The corporation shall be deemed to be a common carrier within the meaning of section 3(h) of the Communications Act of 1934, as amended, and as such shall be fully subject to the provisions of title II and title III of that Act. The provision of satellite terminal station facilities by one communication common carrier to one or more other communications common carriers shall be deemed to be a common carrier activity fully subject to the Communications Act. Whenever the application of the provisions of this chapter shall be inconsistent with the application of the provisions of the Communications Act, the provisions of this chapter shall govern. Pub.L. 87-624, Title IV, § 401, Aug. 31, 1962, 76 Stat. 426.

FILED NOV 21 1975

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED NOV 25 1975

CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD L. MASON, et al, Plaintiffs, v. UNITED STATES OF AMERICA, et al, Defendants.	NO. CV 75-2260-IH JUDGMENT DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION UNDER RULE 12(b)(1)

This Order is made pursuant to two separate Defendants' motions which were originally heard and argued September 22, 1975, and further briefed thereafter and further heard and argued November 17, 1975. Said motions are motion of federal Defendants, i.e., United States of America and Federal Communications Commission, filed September 5, 1975, to dismiss the action, and motion of

Defendants GTE Satellite Corporation and General Telephone and Electronics Corporation for judgment on the pleadings filed September 5, 1975 (which motion was treated by the Court as a motion to dismiss the action for lack of standing and for lack of subject matter jurisdiction). The remaining Defendant, American Telephone and Telegraph Company, joined in both said motions and was deemed to have the benefit thereof.

Pursuant to a minute order denying said motions on ground of lack of standing but granting said motions for lack of subject matter jurisdiction, and for the reasons enunciated in a transcript filed contemporaneously herewith,
IT IS ORDERED AS FOLLOWS:

1. Plaintiffs shall take nothing by their action. Judgment is entered against Plaintiffs and in favor of each Defendant with costs of $_____.

2. The Clerk shall transmit a copy of this Judgment together with a copy of the said minute order to counsel for all parties.

DATED: November 20, 1975.

/s/ IRVING HILL, Judge
United States District Court

Supreme Court, U. S.
FILED
SEP 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-313

RICHARD L. MASON, individually, and A. MARCO TURK, Trustee of the Testamentary Trust Under the Will of Harry Turk, deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; GTE SATELLITE CORPORATION, etc.; GENERAL TELEPHONE AND ELECTRONICS CORPORATION; and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents.

BRIEF OF RESPONDENTS GSAT, GT&E AND AT&T IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-313

RICHARD L. MASON, individually, and A. MARCO TURK, Trustee of the Testamentary Trust Under the Will of Harry Turk, deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; GTE SATELLITE CORPORATION, etc.; GENERAL TELEPHONE AND ELECTRONICS CORPORATION; and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents.

BRIEF OF RESPONDENTS GSAT, GT&E AND AT&T IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

The only question presented is the following:

Does a district court have jurisdiction to hear a collateral challenge to a Federal Communications Commission order which is appealable under 47 U.S.C. § 402(b) to the United States Court of Appeals for the District of Columbia?

STATEMENT OF THE CASE

Petitioners own 280 acres of undeveloped land in the Triunfo Pass area of the Santa Monica Mountains in

Los Angeles County, California. On December 22, 1970, the predecessor of Respondent GTE Satellite Corporation ("GSAT") filed an application with the Federal Communications Commission ("FCC") for approval of a domestic satellite communications system, including an earth satellite station to be constructed in the Triunfo Pass area. On January 11, 1971 petitioner Mason wrote GSAT's parent corporation, General Telephone & Electronics Corporation ("GT&E"), asserting that Triunfo Pass was "most desirable for a Satellite Ground Station" and offering to sell his land for the proposed earth station. On January 18, 1971, Mason also placed an advertisement for the sale of his Triunfo Pass land, describing it as "the best of possible Los Angeles sites" for an earth station.[1]

On September 12, 1973, after public notice and hearing, the FCC issued a Memorandum Opinion and Order granting GSAT permission to construct the proposed system, including an earth station at Triunfo Pass.[2] Petitioners knew of the FCC order. They did not appear in the proceedings to seek a rehearing as permitted under the FCC's rules (47 C.F.R. § 1.106). The FCC's order was appealed by certain interested parties (*Network Project v. FCC*, 511 F.2d 786, 797 (D.C. Cir. 1975)), but petitioners did not participate in the appellate proceedings or otherwise seek judicial review within the 30-day period prescribed by 47 U.S.C. § 402(c). Instead, they urged GSAT to purchase or lease their land for the earth station site. By certified letter dated July 16, 1974, petitioner Turk, an attorney, notified GSAT that if it did not purchase petitioners' land they would undertake legal efforts "to keep GTE out of our area." GSAT

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[1] *Application of GTE Satellite Corp.*, 59 F.C.C. 2d 923, 924 (1976).

[2] *Application of Hughes Aircraft Co. and GTE Satellite Corp.*, (Docket No. 19812), 43 F.C.C. 2d 1141 (1973).

declined to respond to this threat and ultimately purchased a 40-acre tract adjacent to that offered by petitioners. Thereafter, petitioners made good on their threat by filing suits in state court[3] and federal district court seeking to enjoin construction of the Triunfo Pass station.

Petitioners' complaint was filed in the District Court on June 30, 1975, some 20 months after expiration of the 30-day period prescribed by 47 U.S.C. § 402(c) for seeking judicial review of FCC orders granting construction permits. The complaint alleged that the FCC's September 12, 1973 order failed to comply with requirements of the National Environmental Policy Act ("NEPA"), and sought a judicial declaration invalidating the FCC order on that ground. Respondents moved to dismiss the complaint on the grounds that jurisdiction to review FCC orders granting construction permits is vested exclusively in the Court of Appeals for the District of Columbia pursuant to 47 U.S.C. § 402(b). The District Court granted the motion to dismiss for lack of subject matter jurisdiction, and on November 21, 1975 judgment was entered for respondents. Petitioners appealed, and on May 27, 1977 the Court of Appeals affirmed the decision of the District Court, holding that 47 U.S.C. § 402 "clearly ousts district courts of jurisdiction over chal-

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[3] In the state court action, petitioners sought a writ of mandate to enjoin construction of the Triunfo Pass station on the grounds of alleged failure to comply with the environmental impact report requirements of the California Environmental Quality Act ("CEQA"). *Richard L. Mason, et al. v. County of Los Angeles, et al.*, Los Angeles Superior Court No. C-122693, filed May 5, 1975. Following trial, the state court entered judgment for GSAT and the other defendants on December 22, 1975, specifically finding: (1) that there had been full compliance "with each and every applicable federal, state and local law and ordinance . . . including each and every applicable requirement of CEQA and any guidelines promulgated thereunder;" and (2) that plaintiffs had instituted the state action "as a bargaining lever and not for any legitimate purpose."

lenges to FCC orders." (App. A to Petition). This Petition followed.[4]

REASONS FOR DENYING WRIT

Petitioners have devoted considerable attention in their brief to the requirements of NEPA and the power of district courts generally to enforce NEPA. It is doubtless their intent in so doing to suggest the existence of the substantial, unresolved federal issue which this Court's Rule 19 suggests is necessary to justify the exercise of jurisdiction on writ of certiorari. Petitioners' arguments with respect to the scope of NEPA and its enforcement are immaterial to the resolution of this case, however. The sole issue raised herein is whether the provision in 47 U.S.C. § 402(b) for direct appeal from an FCC order granting a construction permit precludes a collateral challenge to such order in district court proceedings. With respect to this issue, no claim has been made, or can be made, that the requirements of Rule 19 have been satisfied. The decision of the Court of Appeals on this point was demonstrably correct and entirely in accord with the decisions of this Court and of the other courts of appeal which have considered this jurisdictional issue.

[4] Shortly after the District Court's judgment, petitioners appeared in proceedings that were pending before the FCC on requests by GSAT for modification of its construction permit. In those proceedings (F.C.C. Docket 20201), petitioners belatedly contended that the September 12, 1973 issuance of GSAT's construction permit was invalid because of alleged noncompliance with NEPA. On June 9, 1976, the FCC issued a Memorandum Opinion and Order, holding that petitioners' challenge to the September 12, 1973 Order was untimely and in any event that the 1973 Order complied with NEPA since the Commission originally had "considered environmental factors and found GSAT had made a sufficient showing that the proposed station would not damage the quality of the environment." *Application of GTE Satellite Corp.*, 59 F.C.C. 2d 923, 924 (1976). Petitioners could have appealed this order pursuant to 47 U.S.C. § 402(b), but did not do so.

I. THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE

A. Jurisdiction to Review FCC Construction Permit Orders is Vested Exclusively in the Court of Appeals for the District of Columbia

It is beyond dispute "that Congress . . . may prescribe the procedure and conditions under which, and the courts in which, judicial review of administrative orders may be had." *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). In § 402(b) of the Communications Act, Congress did so prescribe a specific, complete and exclusive mode for judicial review of FCC orders granting construction permits. Section 402(b)(1) provides that "Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia . . . [b]y any applicant for a construction permit," and § 402(b)(6) provides that such appeal may be taken "[b]y any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying . . . [such] application. . . ."[5] The appeal must be taken "within thirty days from the date upon which public notice is given of the decision or order complained of" (§ 402(c)); the appeal must be heard by the Court of Appeals "[a]t the earliest convenient time" (§ 402(g)); and the Court of Appeals' decision is subject to review only by the Supreme Court. (§ 402(j)).

This Court has emphasized that when Congress has enacted such "a specific statutory scheme for obtaining review . . . the statutory mode of review [must] be adhered to notwithstanding the absence of an express statu-

[5] Judicial review of all other FCC orders, not enumerated in § 402(b), is also narrowly confined. Such orders may be reviewed only by a Court of Appeals (47 U.S.C. § 402(a); 28 U.S.C. § 2343), and petitions for such review must be filed within 60 days (28 U.S.C. § 2344).

tory command of exclusiveness." *Whitney Bank v. New Orleans Bank*, 379 U.S. 411, 422 (1965). Accordingly, the courts have uniformly held that § 402(b)'s provision for appellate review of FCC orders is "exclusive," *Citizens Committee v. FCC*, 506 F.2d 246, 269 (D.C. Cir. 1974), and that "all attacks on . . . orders of the Commission, on whatever ground, must be by appeal to the District of Columbia Circuit under § 402(b). . . ." *Valley Vision, Inc. v. FCC*, 399 F.2d 511, 514 (9th Cir. 1968).

The reasons for requiring exclusive adherence to § 402's specific statutory review scheme are obvious. By providing for centralized and expedited review in one court of appeals, Congress clearly sought to guarantee uniformity of decision and to preclude the delay, uncertainty, and frustration of FCC action that might occur if judicial review could be had in any of the district courts. The quick finality of decision intended by Congress could never be achieved if parties aggrieved by FCC construction permit orders could collaterally attack such orders years after expiration of § 402(c)'s 30-day time limit for direct judicial review. Moreover, tolerance of district court suits would encourage multiplicity of litigation and forum shopping, which would plainly undermine the uniformity of decision Congress sought to achieve by confining judicial review to one court.

These are not hypothetical considerations. The FCC's order of September 12, 1973 was appealed by several interested parties. *Network Project v. FCC*, 511 F.2d 786, 797 (D.C. Cir. 1975). Untimely judicial review of the same FCC order by whatever district court might be chosen by a plaintiff would necessarily entail what Congress sought to avoid — duplicative judicial proceedings, delay and potential conflict with decisions rendered by the Court of Appeals for the District of Columbia.

B. NEPA Does Not Provide an Independent Jurisdictional Basis for Judicial Review of the FCC's Order

Petitioners assert that § 402(b) should be deemed inapplicable because their claim is based on NEPA. This argument assumes that the applicability of an exclusive review scheme depends upon the substantive basis of a litigant's challenge to an administrative order. Such is clearly not the case. When there is a statutory provision prescribing a specific route for judicial review, all arguments, "constitutional, jurisdictional, substantive, and procedural," must be raised solely in the statutory review proceeding. *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967). "[A]ll attacks on . . . orders of the [Federal Communications] Commission, on whatever ground, must be by appeal to the District of Columbia Circuit under § 402(b). . . ." *Valley Vision, Inc. v. FCC*, *supra*, 399 F.2d at 514. Section 402(b)'s restriction of judicial review applies to all challenges to construction permit orders, whether based on NEPA or some other statutory or constitutional ground.

Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), *cert denied*, 409 U.S. 1125 (1973), is a case directly in point. *Getty* was a lawsuit filed in the district court, challenging action taken by the EPA Administrator under the Clean Air Act. Section 307(b)(1) of that Act, like § 402(b) of the Communications Act, restricts judicial review of actions by the Administrator to an appeal to the Court of Appeals for the District of Columbia, which must be filed within 30 days of public notice of the Administrator's action. 42 U.S.C. § 1857h-5(b). Plaintiff did not comply with the statutorily prescribed procedure, but rather, like petitioners here, filed an action in district court. Plaintiff urged that its claim was based on NEPA and therefore not subject to the exclusive review provisions of the Clean Air Act. The Third Circuit summarily rejected this argument, stating:

"Appellant's . . . argument is that EPA's failure to file an environmental impact statement pursuant to section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), renders the Administrator's compliance order ultra vires. Even if we were to agree with Getty's premise that EPA is subject to the NEPA requirement, such an issue is properly raised in a section 307 proceeding. . . . Failure to utilize the section 307 proceeding forecloses review. . . ." (467 F.2d at 359.)

This Court has also made clear, under analogous circumstances, that NEPA does not provide a jurisdictional base for review of an administrative order when such review is otherwise precluded or restricted by specific statutory provision. *United States v. SCRAP*, 412 U.S. 669 (1973). *SCRAP* was an action to enjoin enforcement of an ICC rate order because of an alleged failure to prepare an environmental impact statement in violation of NEPA. This Court had previously ruled that 48 U.S.C. § 15(7) precluded federal court jurisdiction to enjoin such ICC orders. Plaintiff contended, however, as do petitioners in this case, that "NEPA implicitly conferred authority 'on the federal courts to enjoin *any* federal action taken in violation of NEPA's procedural requirements.'" (412 U.S. at 690.) This Court disagreed, reasoning that "NEPA was not intended to repeal by implication any other statute" (412 U.S. at 694), and that "nothing either in the language or history of NEPA . . . suggests a restoration of previously eliminated judicial power. . . ." (412 U.S. at 695.)

Petitioners assert that § 402(b) applies only to "judicial review of the *merits* of FCC orders," and that their NEPA attack "does not go to the merits of the FCC's action, but rather to the FCC's ability to act at all." (Petition, p.25). The same type of argument was rejected in *Getty*, where plaintiffs sought to avoid the exclusive review provision of the Clean Air Act by asserting that NEPA rendered the challenged administrative order "ultra vires." *Getty v. Ruckelshaus, supra*, 467 F.2d at 359. Similarly, in *North Carolina v. FPC*, 393 F.Supp. 1116 (M.D.N.C. 1975), the court rejected the notion that an exclusive review scheme can be avoided by characterizing the nature of the judicial review sought. In that case, plaintiffs sued in district court, challenging an order of the Federal Power Commission on the ground that it violated provisions of the Wild and Scenic Rivers Act. In an attempt to avoid the exclusive review provisions of § 313(b) of the Federal Power Act, they asserted, like petitioners here, that they were not seeking review of the FPC's license order under the Federal Power Act, but rather, seeking to enforce a duty under the Wild and Scenic Rivers Act. In rejecting this argument the court stated:

"In their oral argument and throughout their briefs, plaintiffs repeatedly make the point that they are not seeking review of the F.P.C. license in this Court, rather they are seeking review of F.P.C. action under the Wild and Scenic Rivers Act. In the final analysis, it is this distinction which breaks down under scrutiny. . . . [I]f plaintiffs are correct, could not each and every affected landowner bring a separate suit for the enforcement of rights under the Wild and Scenic Rivers Act or the National Environmental Policy Act in both this Court or the District Court for the Western District of Virginia? What then would become of section 313(b) of the Federal Power Act? What then would we do with those 'simple words of plain meaning (which) leave no room to doubt the congressional purpose and intent'?" (393 F.Supp. at 1128.)

Thus, however petitioners might wish to characterize their suit they run afoul of § 402(b). A "statutory procedure for review is applicable" even though the "order

is not directly attacked — so long as the practical effect of a successful suit would contradict or countermand a Commission order." *B. F. Goodrich Co. v. Northwest Industries, Inc.*, 424 F.2d 1349, 1352-54 (3d Cir.), *cert denied*, 400 U.S. 822 (1970). Here the agency order is directly attacked, and there is no doubt but that petitioners seek to "countermand" the order — they avowedly seek a judicial declaration of its invalidity. The fact that they premise their challenge on NEPA rather than the Communications Act is irrelevant.

C. Review of the FCC's Construction Permit Order Is Not Governed by Any Provision in Chapter 6 of Title 47

Chapter 5 of Title 47 (§§ 151-609) is the Communications Act of 1934, the basic law governing the FCC's power and authority. Chapter 6 of Title 47 (§§ 701-744) is the Communications Satellite Act of 1962. The Petition (pp.31-38) asserts that the FCC's September 12, 1973 Order was issued pursuant to the 1962 Act and that § 402(b) is inapplicable to judicial review of orders issued under the 1962 Act. The Court of Appeals correctly rejected this argument. The FCC's September 12, 1973 Order was not issued under authority of the 1962 Act, but even if it had been, § 402(b) would nonetheless apply.

The express purpose of the 1962 Act was to authorize United States participation in a "*global* communications network"[6] (§ 701) and the formation of a "communication satellite corporation" ("COMSAT") (§§ 731-35). In § 701(d) Congress expressly disclaimed any intention to have the 1962 Act "preclude the creation of additional communications satellite systems," i.e., *domestic* communications satellite systems. The system authorized by

[6] Emphasis here, and following, is supplied unless otherwise noted.

the FCC's September 12, 1973 order is a "*domestic* satellite system," (43 F.C.C. 2d 1141), and all administrative and judicial proceedings held in connection therewith have been conducted pursuant to, and under the authority of, the provisions of the 1934 Act,[7] including the § 402(b) appeal to the Court of Appeals for the District of Columbia. *Network Project v. FCC, supra* at 789.

In its First Report and Order in the *Domestic Communications-Satellite* proceedings the FCC rejected contentions that the 1962 Act governs *domestic* satellite systems authorizations, and expressly found that the Commission's authority to grant permits for *domestic* satellite systems is based on the 1934 Communications Act, i.e., Chapter 5 of Title 47. The Commission stated:

> ". . . The Commission's clear jurisdiction over commercial domestic satellite facilities under the 1934 act was not withdrawn by the 1962 act, which legislated in the field of international satellite communications. The declared purpose of the 1962 act was to establish a global satellite communications system in conjunction and in cooperation with other countries (sec. 102(a)) and to provide for United States participation in the global system * * * in the form of a private corporation, subject to appropriate regulations (sec. 102(c)). H.R. Rept. No. 1636, 87th Cong., second sess., p.7. . . .
>
> ". . . [I]t would be unreasonable to assume that Congress, in enacting provisions tailored to an international system established in conjunction and in cooperation with other countries, would have sup-

[7] *See, Establishment of Domestic Communication – Satellite Facilities by Nongovernmental Entities*, 22 F.C.C. 2d 128-133 (1970); *Establishment of Domestic Communications – Satellite Facilities by Non-Governmental Entities*, 35 F.C.C. 2d 844, 860 (1972); *Establishment of Domestic Communications – Satellite Facilities by Non-Governmental Entities*, 38 F.C.C. 2d 665, 703 (1972); *Applications of GTE Satellite Corp.*, 49 F.C.C. 2d 42, 54 (1974).

planted the 1934 Act in the domestic field — traditionally only of sovereign concern — without mentioning that it was doing so. The 1962 Act does not contain any express requirement that domestic satellite service shall be provided in accordance with the provisions governing the global system or any statement withdrawing the Commission's powers under the 1934 act to authorize an additional non-Government domestic system." *Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities*, 22 F.C.C. 2d 86, 130-131 (1970).

Even if the 1962 Act were assumed somehow to pertain to issuance of a construction permit for *domestic* satellite facilities (which is clearly not the case), it still would not follow that the September 12, 1973 order was outside the scope of § 402(b). The 1962 Act is expressly designated as an amendment and supplement to the 1934 Act (§ 721(c)), and since it contains no procedural provisions, it necessarily must be implemented by the Inquiry, Rule-Making and Hearing procedures authorized under the 1934 Act. Indeed, § 721(c) of the 1962 Act expressly states that authorization of construction of satellite stations for international networks is to be undertaken by "the Federal Communications Commission, *in its administration of the provisions of the Communications Act of 1934*, as amended, and as supplemented by this chapter. . . ." Thus, had GSAT's permit been issued under the 1962 Act, which it was not, § 402(b) would nonetheless have governed judicial review thereof.

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE NINTH CIRCUIT AND THOSE OF THIS COURT OR OF OTHER CIRCUITS

The Ninth Circuit's decision is supported by, and consistent with, the decisions of this Court construing statutory exclusive review provisions. *E.g.*, *Whitney Bank v.*

New Orleans Bank, 379 U.S. 411, 419 (1965). Moreover, this Court's reasoning in *United States v. SCRAP*, 412 U.S. 669, 694 (1973) fully supports the Court of Appeals' decision that NEPA does not provide a jurisdictional base for judicial review otherwise precluded by § 402(b).

There are many decisions by the circuit courts construing statutory review provisions analogous to § 402(b). *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1972) was cited by the Ninth Circuit in support of its decision below and is the circuit court decision most directly in point since it considers the applicability of a statutory review provision to claims based on NEPA. The other circuit court decisions hold that administrative orders reviewable under special statutory review schemes may not be collaterally attacked in enforcement proceedings or in district court suits initiated under the Administrative Procedure Act or the Declaratory Judgments Act.[8] Without exception, these decisions are consistent with the rationale of the decision below.

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[8] E.g., *Robinson v. Dow*, 522 F.2d 855, 858 (6th Cir. 1975) exclusive review of CAB decisions, 49 U.S.C. § 1486); *City of Highland Park v. Train*, 519 F.2d 681, 688-89 (7th Cir. 1975), *cert. denied*, 47 L.Ed.2d 337 (1976) (exclusive review of orders of EPA Administrator, Clean Air Act, 42 U.S.C. § 1857h-5(b)); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 659-61 (D.C. Cir. 1975) (Clean Air Act exclusive review provisions); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1304-5 (10th Cir. 1973) (Clean Air Act exclusive review provisions); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973) (exclusive review of CAB decisions); *Utah Int'l, Inc. v. EPA*, 478 F.2d 126, 128 (10th Cir. 1973) (Clean Air Act exclusive review provisions); *Coca-Cola Co. v. FTC*, 475 F.2d 299, 302 (5th Cir.) *cert. denied*, 414 U.S. 877 (1973) (exclusive review of FTC orders, Federal Trade Commission Act, 15 U.S.C. § 45(c)); *Nader v. Volpe*, 466 F.2d 261, 265-68 (D.C. Cir. 1972) (exclusive review provisions of National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1394(a)(1); *UMC Indus v. Seaborg*, 439 F.2d 953, 955 (9th Cir. 1971) (exclusive review of Board of Patent Interferences decisions, Atomic Energy Act, 42 U.S.C. § 2182); *B.F. Goodrich Co. v. Northwest Indus.*, 424 F.2d 1349, 1352-54 (3rd Cir.), *cert. denied*, 400 U.S. 822 (1970) (exclusive review of ICC orders, Urgent Deficiencies Act, 28 U.S.C. § 2321); *Taylor v. Cohen*, 405 F.2d 277, 279-80 (4th

None of the district court decisions cited by petitioners supports the notion that NEPA confers district court jurisdiction otherwise precluded by specific statutory review provisions. Four of the cases involved actions to review administrative orders which were not subject to exclusive review schemes.[9] Another involved a situation where there was no final agency order appealable under the exclusive review provisions of the applicable regulatory statute, and the court dismissed the complaint because of the eventual availability of appellate review under the statutory scheme.[10]

Izaak Walton League v. Schlesinger, 337 F.Supp. 287 (D.D.C. 1971) is the only reported case even remotely

Cir. 1968) (exclusive review of HEW orders, 20 U.S.C. § 24lk); *Gardner v. Alabama*, 385 F.2d 804, 810 (5th Cir. 1967); *cert. denied*, 289 U.S. 1046 (1968) (exclusive review of HEW orders, Social Security Act, 42 U.S.C. § 1316(a)(3)); *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967) (exclusive review of FTC decisions, Clayton Act, 15 U.S.C. § 21); *United States v. Southern Railway Co.*, 380 F.2d 49, 53-55 (4th Cir. 1967) (exclusive review of ICC orders); *United States v. Southern Railway Co.*, 364 F.2d 86, 91-93 (5th Cir. 1966); *cert. denied*, 386 U.S. 1031 (1967) (exclusive review of ICC orders); *Oling v. Air Line Pilots Ass'n*, 346, F.2d 270, 276 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965) (exclusive review of CAB decisions).

[9] *Environmental Defense Fund v. Hardin*, 325 F.Supp. 1401 (D.D.C. 1971), was an action brought against the Secretary of Agriculture, whose decisions are not subject to a statutory review scheme. *Save Our Sound Fisheries Ass'n v. Calloway*, 387 F.Supp. 292 (D.R.I. 1974) was an action brought against the Secretary of the Army, whose decisions are not subject to a statutory review scheme. *Citizens for Clean Air, Inc. v. Corps of Engineers*, 349 F.Supp. 696 (S.D.N.Y. 1972), was an action challenging the validity of a permit issued by the Corps of Engineers, and there is no statutory provision prescribing exclusive review proceedings to test the validity of permits issued by the Corps of Engineers. *City of Romulus v. County of Wayne*, 392 F.Supp. 578 (E.D. Mich. 1975), was an action against a county to enjoin construction of an airport runway, and there is no statutory provision which restricts judicial review of action taken by counties.

[10] *Gage v. Commonwealth Edison Co.*, 356 F.Supp. 80 (N.D. Ill. 1972).

inconsistent with the Ninth Circuit's decision below. The district court in *Izaak Walton* misapplied this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958) to justify review of action by the Atomic Energy Commission which was subject to exclusive review in the court of appeals under 28 U.S.C. § 2342. Analysis of *Leedom v. Kyne* shows that it is plainly inapposite in this case.

Leedom involved a blatant violation of § 9(b) of the National Labor Relations Act, which governs NLRB certifications of collective bargaining units. Section 9(c) of the Act provides that a § 9 certification order may be contested in unfair-labor-practice enforcement proceedings under § 10 of the Act. Aside from this indirect, and not immediately available route, the Act makes no express provision for judicial review of § 9 certification orders. Moreover, this Court had previously held that § 9 certification orders are not final orders subject to direct appellate review in the Courts of Appeals (358 U.S. at 187). Thus, the issue before the Court in *Leedom* was whether the statute's *omission* of a provision for direct appellate review implied that Congress intended to preclude district court jurisdiction to review § 9 orders made in blatant violation of the statute's express command. In answering this question in the negative, the Court emphasized the absence of a statutory provision for direct appellate review. This meant, the Court said, that there would be no practical "means . . . to protect and enforce" rights guaranteed by § 9 unless jurisdiction were found in the district courts. Since § 9 rights were important, the Court reasoned, Congress by inference must be deemed to have intended district court jurisdiction. (358 U.S. at 190.)

In this case, of course, the situation is the very opposite of that in *Leedom*. Here there is a final agency order at issue, and here the statute does provide for direct appellate review. This is not a situation where con-

gressional silence with respect to immediately available appellate review compels an inference of congressional intent that district courts have jurisdiction. Quite the contrary, here Congress explicitly provided in § 402(b) a specific means of protecting any rights claimed to be adversely affected by an FCC order granting a construction permit. And in the situation here present, where Congress has expressly prescribed a scheme for review of the order in question, it would make no sense, and indeed, be contrary to Congress' express purpose and the rationale of *Leedom*, to infer a congressional intent that jurisdiction to review FCC orders be vested in the various district courts.

This Court has emphasized that "The *Kyne* exception is a *narrow one*, not to be extended to permit plenary district court review of" agency action that "does not comport with the law." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). As most recently explained by Judge Friendly, "... the most that can be extrapolated from *Leedom v. Kyne* is that an injunction may be issued 'if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law. . . .'" *Sterling Drug, Inc. v. Weinberger*, 509 F.2d 1236, 1239 (2d Cir. 1975). There is nothing in this case even remotely approaching the bounds of such a narrow exception.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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State of California)
) SS
County of Los Angeles)

James A. Bertotti, being first duly sworn deposes and says:

That affiant is and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 1706 Maple Avenue, Los Angeles, California 90015

That on September 24....197.7.. affiant served copies of the within

Richard L. Mason, individually, and A. Marco Turk, Trustee of the Testamentary Trust under the will of Harry Turk, deceased,
Petitioners

VS

United States of America; Federal Communications Commission; GTE Satellite Corporation, etc.; General Telephone and Electronics Corporation; and American Telephone and Telegraph Company,
Respondents

to the following:

(via Air Freight)

Solicitor General
Department of Justice
Washington, D.C. 20530

(40 copies plus 2 for confirmation)

(via Messenger Service)

Fadem, Berger & Stocker
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(3 copies)

J. Mark Waxman, Esq.
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I certify (or declare), under penalty of perjury that the foregoing is true and correct.

Executed on September 24...197.7.. at Los Angeles, California

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

James A. Bertotti

On this .....24th.....day of.....September..., A.D., 19.77., before me.....Lawrence E. Hieger..., a Notary Public in and for said County and State, personally appeared...James A. Bertotti.....known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that...he.....executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal and year in this certificate first above written.

OFFICIAL SEAL
LAWRENCE E. HIEGER
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires May 20, 1978

Lawrence E Hieger
Notary Pullic in and for said County and State

Supreme Court, U.S.
FILED
NOV 3 1977
MICHAEL RODAK, JR., CLERK

No. 77-313

In the Supreme Court of the United States

OCTOBER TERM, 1977

RICHARD L. MASON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
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WERNER K. HARTENBERGER,
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On September 12, 1973, the Federal Communications Commission entered a Memorandum Opinion and Order authorizing the construction and operation of an earth station as part of a domestic satellite system. *Application of Hughes Aircraft Co. (National Satellite Services Inc.)*, 43 F.C.C. 2d 1141. Petitioners are owners of land adjacent to the site of the station in the Triunfo Pass area of the Santa Monica Mountains in California. They did not participate in the Commission's proceedings or in an appeal of the Commission's order taken by other parties under Section 402(b) of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. 402(b), to the United States Court of Appeals for the District of Columbia Circuit. *Network Project* v. *Federal Communications Commission*, 511 F. 2d 786.

Section 402(c) of Title 47 provides that appeals under Section 402(b) must be filed within 30 days. On June 30, 1975, 21 months after the Commission's decision, petitioners filed a suit in the United States District Court for the Central District of California to enjoin construction of the station. Named as defendants were the Commission, the United States, GTE Satellite Corporation,[1] General Telephone and Electronics Corporation, and American Telephone and Telegraph Company. The complaint alleged that the Commission's 1973 order violated the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, because the Commission had not prepared an environmental impact statement prior to entering its order. The district court dismissed for lack of jurisdiction (Pet. App. C-1 to C-3). The court of appeals affirmed (Pet. App. A-1 to A-6).

The decision of the court of appeals is correct, does not conflict with any other decision, and does not warrant review by this court. As the court of appeals stated (Pet. App. A-2 to A-3):

> 47 U.S.C. § 402 expressly limits proceedings to "enjoin, set aside, annul or suspend" an order under Chapter 5 of the Communications Act of 1934 to the Courts of Appeals. *See also* 28 U.S.C. § 2342. Some orders may be reviewed only in the D.C. Circuit. 47 U.S.C. § 402(b). But whether or not this is such an order, § 402 clearly ousts district courts of jurisdiction over challenges to FCC orders. *Cf. United States* v. *SCRAP*, 412 U.S. 669 (1973).

[1]Successor to the original applicants.

Petitioners err in contending that Commission orders authorizing satellite facilities are entered under the Communications Satellite Act of 1962, 76 Stat. 419, 47 U.S.C. 701 *et seq.*, and are not subject to Section 402 of the 1934 Act. The court below correctly ruled (Pet. App. A-3 to A-4) that the 1962 Act was

> addressed to international, not domestic, satellite communications. 47 U.S.C. § 701. The only reference in the 1962 Act to domestic communications is the declaration of policy that Congress did not intend to preclude use of the global system for domestic communications services "where consistent with the provisions of [the 1962 Act]."
>
> We conclude that the FCC's authority over domestic satellite communications systems flows from the 1934 Act and that § 402 requires review in the Courts of Appeals, not in the district courts. This view finds support in *Network Project* v. *F.C.C.*, 511 F. 2d 786 (D.C. Cir. 1975) where the D.C. Circuit reviewed, under § 402(b), orders of the FCC authorizing construction of domestic satellite communications facilities.

Petitioners' contention that NEPA alters the jurisdictional scheme established in the 1934 Act is without merit. "NEPA was not intended to repeal by implication any other statute." *United States* v. *SCRAP*, 412 U.S. 669, 694, 696; *Flint Ridge Development Co.* v. *Scenic Rivers Assn.*, 426 U.S. 776, 788. Thus jurisdiction over challenges to FCC orders, whether founded on alleged violations of NEPA or other defects, is reserved by Section 402 exclusively to the courts of appeals, under the time limits specified in that section. See *Yakus* v. *United States*, 321 U.S. 414; *Califano* v. *Sanders*, 430 U.S. 99, 108. In the case of construction permits, which are subject

to review under Section 402(b), only the Court of Appeals for the District of Columbia Circuit has jurisdiction. *Valley Vision, Inc.* v. *Federal Communications Commission*, 399 F. 2d 511, 514 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

WERNER K. HARTENBERGER,
General Counsel,
Federal Communications Commission.

NOVEMBER 1977.

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